orig.

STATE OF MICHIGAN
IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant.

Supreme Court Case No. 126274

Court of Appeals Case No. 243763

Wayne County Circuit Court
Case No. 00-018619-NO

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DEFENDANT-APPELLANT'S RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLEE'S CROSS-APPLICATION FOR LEAVE TO APPEAL

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In its application filed June 3, 2004, Defendant Ford Motor Company ("Ford") applied to this Court for leave to appeal from the unpublished per curiam opinion of the Court of Appeals issued April 22, 2004 (Ford's Application, Appendix, Tab A), reversing the Wayne County Circuit Court's August 21, 2002 Order Granting Dismissal With Prejudice (Ford's Application, Appendix, Tab B) and its September 5, 2002 Order Excluding The Testimony of "Propensity" Witnesses (Ford's Application, Appendix, Tab C).

Ford and Plaintiff agree that this Court has jurisdiction over Ford's application for leave, filed within 42 days of the Court of Appeals' filing of the April 22, 2004 opinion that is the subject of Ford's application, pursuant to MCR 7.301(A)(2) and MCR 7.302 (C)(2)(b) and (C)(4)(a).

Plaintiff has represented that she filed a combined response to Ford's application and a cross-application for leave to appeal on July 1, 2004. Assuming Plaintiff's representation is correct, the cross-application was timely filed pursuant to MCR 7.302(D)(2), but the response brief was untimely pursuant to MCR 7.302(D)(1), in that the day set for the hearing on Ford's application was June 29, 2004.

Plaintiff's cross-application seeks review of the April 22, 2004 Court of Appeals opinion to the extent it did not reverse in full the trial court's September 5, 2002 order excluding the testimony of the "propensity" witnesses and to the extent it affirmed the trial court's February 16, 2001 Order *in limine* excluding reference to a prior misdemeanor (now expunged).

For the reasons stated in this response, Ford submits that this Court should deny

Plaintiff's cross-application and affirm in their entirety the rulings of the Wayne County Circuit Court.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT ABSTAIN FROM REVIEWING PRE-TRIAL *IN LIMINE* RULINGS WHERE PLAINTIFF'S ARGUMENTS CONTEMPLATE DEFENDANTS "OPENING THE DOOR" TO RECONSIDERATION OF THE RULINGS IF THIS CASE PROCEEDS TO TRIAL?

The Court of Appeals answered "Yes" in part "No" in part.
The trial court answered "Yes."
Ford answers "Yes."
Plaintiff answers "No."

II. DID THE TRIAL COURT PROPERLY ACT WITHIN ITS DISCRETION IN ISSUING AN *IN LIMINE* ORDER EXCLUDING EVIDENCE OF A MISDEMEANOR CONVICTION THAT HAD MARGINAL PROBATIVE VALUE AND PRESENTED THE DANGER OF OVERWHELMING PREJUDICE, AND A STATE CRIMINAL STATUTE PROHIBITS DISCLOSURE OF THE EVIDENCE?

The Court of Appeals answered "Yes."
The trial court answered "Yes."
Ford answers "Yes."
Plaintiff answers "No."

III. DID THE TRIAL COURT PROPERLY ACT WITHIN ITS DISCRETION IN ISSUING AN *IN LIMINE* ORDER EXCLUDING EVIDENCE FROM OTHER WOMEN CONCERNING THEIR OWN "CLAIMS" WHERE THE TESTIMONY WAS NOT RELEVANT TO PLAINTIFF'S CLAIM, WAS OVERWHELMINGLY PREJUDICIAL IN CONTENT, CONSISTED OF UNPROVEN ALLEGATIONS THAT WOULD REQUIRE SERIAL MINI-TRIALS, AND WOULD THEREFORE CONFUSE THE JURY?

The Court of Appeals answered "Yes" in part and "No" in part.
The trial court answered "Yes."
Ford answers "Yes."
Plaintiff answers "No."

I. INTRODUCTION

In opposing the application to this Court submitted by Defendant-Appellant Ford Motor Company ("Ford"), Plaintiff-Appellee Justine Maldonado ("Plaintiff") attempts to strategically distract the Court from the critical issues raised in Ford's application. As a fallback position, however, Plaintiff seeks a cross-application that would deprive the trial court of any modicum of discretion in determining those evidentiary issues that historically are reserved to the trial court in the first instance.

It has come through loud and clear throughout the course of this protracted litigation that Plaintiff is willing to resort to all sorts of tactics, including judge-shopping and other misconduct, to obtain the evidentiary rulings she desires. Her cross-application represents just the most recent of those efforts, and should be disregarded.

II. COUNTER-STATEMENT OF THE CASE

As she has throughout this litigation, Plaintiff continues to confuse and obscure the facts with respect to the four other Ford employees (Lula Elezovic, Pamela Perez, Shannon Vaubel, and Jennifer Cochran) and the contractor's employee (Milissa McClements) who, Plaintiff claims, were in one way or another sexually approached by Mr. Bennett. Plaintiff argues that these women should be permitted to testify to show that Ford's policy prohibiting sexual harassment is ineffective but Plaintiff completely ignores the undisputed fact that not one of these women attempted to use Ford's policy. Plaintiff makes the conclusory assertion that Mr. Bennett's alleged sexual conduct toward each of the five women was so similar as to constitute a "common plan, scheme or system" for purposes of MRE 404(b) despite the total absence of any commonality other than the same actor (Mr. Bennett).

Plaintiff is no more forthcoming with respect to the so-called "M-10 incident."

Notwithstanding Plaintiff's continuous appellations, there is no evidence that the three women involved in the M-10 incident, who were strangers to Ford and Mr. Bennett, were "high school girls." The records regarding these women indicated only that one of them was 17 years old at the time. There was no evidence of ages, nor was any testimony from these women offered. Mr. Bennett and the one woman gave conflicting accounts of what happened on I-275 in 1995, years before the events in this case. Mr. Bennett was charged with a misdemeanor, was convicted and served the sentence imposed on him by the court. Because that same court has since expunged Mr. Bennett's record, it would be inappropriate to comment further, other than to say that Plaintiff continues to take great liberty in embellishing the record, as has been her habit throughout these proceedings.

Plaintiff also misrepresents the trial court's *in limine* ruling excluding the so-called M-10 evidence, i.e., the evidence concerning the misdemeanor conviction and the events underlying the conviction. The February 16, 2001 order *in limine,* entered by Judge Kathleen MacDonald, precluded introduction at trial not only of Mr. Bennett's 1995 misdemeanor conviction, but of the underlying acts as well. In moving for the *in limine* order, Ford and Mr. Bennett expressly stated that the motion sought to exclude "Any evidence of, or reference to, th[e] conviction, or the underlying act." (Brief in Support of Defendants' Joint Motion in Limine to Exclude Unrelated Prior Crime, Wrong or Act, p. 2, attached as Exhibit 1).[1] Judge MacDonald granted the motion in its entirety (Ford's Application, Appendix, Tab D). Judge Giovan repeated the scope of the

[1] Ford and Mr. Bennett jointly filed the motion *in limine* in both Plaintiff's case and the Elezovic case, both of which were pending before Judge MacDonald. The motion was included on the trial court's docket sheet only for the Elezovic case.

exclusion in his order. (Ford's Application, Appendix, Tab B, pp. 2-3). Plaintiff nonetheless makes the remarkable statement that "there is a separate issue, unresolved by the appellate court, as to whether the underlying acts are admissible" (Plaintiff's cross-application, p. 44 n 24). Plaintiff is correct that the Court of Appeals did not address this issue. The Court of Appeals did not address the issue because Plaintiff never raised it until now. Indeed, Plaintiff clearly understood the *in limine* order excluded the underlying acts as exhibited by every brief she has filed, until the one she filed with this Court.

III. LEGAL ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion By Excluding Mr. Bennett's Expunged Conviction.

1. Appellate Courts Apply An Abuse Of Discretion Standard To The Trial Court's *In Limine* Rulings.

The trial court's ruling on an evidentiary decision is reviewed "for abuse of discretion. . . . The trial court's decision on close evidentiary questions cannot 'by definition' be an abuse of discretion." People v Layher, 464 Mich 756, 761; 631 NW2d 281 (2001). All three judges on the Court of Appeals panel agreed that the trial court did not abuse its discretion in excluding the conviction evidence. (Ford's Application, Appendix, Tab A, per curiam opinion, p. 7; opinion, White, J., p 1).

Moreover, this Court, has already determined that an advisory opinion on the pre-trial *in limine* ruling excluding Mr. Bennett's conviction is not warranted. (04/02/02 Order, SC No. 119753, Ford's Application, Appendix, Tab F). Thus, whether an appellate ruling in advance of trial is warranted has already has been answered in the negative, and this Court's earlier decision is the law of the case. Grievance Administrator v Lopatin, 462 Mich 235, 259; 612 NW2d 120 (2000).

2. The Conviction Was Not Notice To Ford That Plaintiff Was Being Subjected To A Sexually Hostile Work Environment.

Ford and Mr. Bennett filed a joint motion *in limine* to exclude from evidence at trial in both this case and the Elezovic case any reference to Mr. Bennett's 1995 misdemeanor conviction or the underlying facts resulting in the conviction. Judge MacDonald analyzed the admissibility of the conviction under MRE 404(b) and the four-pronged test in People v VanderVliet, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

> The evidence must be relevant to an issue other than propensity under Rule 404(b), to "protect[] against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character." Id at 687. (Emphasis added). Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory.
>
> Second, as previously noted, the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial. 2 Weinstein & Berger, Evidence, ¶ 404[08], p 404-49.
>
> Third, the trial judge should employ the balancing process under Rule 403. Other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, a "determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." 28 USCA, p 196, advisory committee notes to FRE 404(b).
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> Finally, the trial court, upon request, may provide a limiting instruction under Rule 105.

In her initial ruling, (01/19/01 Tr., pp. 4-7), Judge MacDonald held that Plaintiff failed to identify a proper purpose under MRE 404(b) to admit the evidence, and further excluded it under the third prong of VanderVliet, MRE 403 (01/19/01 Tr., attached as Exhibit 2, p. 6). In response to Plaintiff's argument that the conviction should be

admitted as to Ford because it was "notice" of a sexually hostile work environment, Judge MacDonald made clear that her overriding concern was the MRE 403 prong of the VanderVliet test: "I think in this instance, as well, my concern is that the prejudice to Ford substantially outweighs any probative value this evidence might have. . . . My concern here is that it's so prejudicial." (Id, pp. 6-8).

Judge Giovan echoed Judge MacDonald's concern in denying Plaintiff's Motion to Dissolve Judge MacDonald's *in limine* ruling. Judge Giovan considered whether the conviction could constitute "notice" under the standards set forth in Chambers v Trettco Inc, 463 Mich 297; 614 NW2d 910 (2000) and Sheridan v Forest Hills Public Schools, 247 Mich App 611; 637 NW2d 536 (2001), lv den, 466 Mich 888; 646 NW2d 475 (2002). He reasoned that the conviction of Mr. Bennett for off-premises conduct involving strangers said little, if anything, about what Mr. Bennett might do in the workplace:

> So, even if technically, not necessarily excludable, the probative value is slight because of the Sheridan and Chambers cases, even if admissible, but when you compare it to the prejudicial effect on its forbidden purpose, it is not a close question. It is not a close question because of the very policy behind the exclusionary rule. If this evidence is admitted, let's remember that there is a, as I understand, a big dispute between the parties on whether this happened at all. I don't know whether it happened. The jury doesn't know whether it happened. But the point of the exclusionary rule is that if this evidence is admitted, then the defendants, both Ford Motor Company and Mr. Bennett, are out of the ballpark; case closed. That's the prejudicial effect.

(06/21/02 Tr., p. 23, Ford's Application, Appendix, Tab R) (emphasis added).

In Radtke v Everett, 442 Mich 368; 501 NW2d 155 (1993), this Court held that an employer can be liable for a sexually hostile work environment created by its agent only if "'the employer had actual or constructive knowledge of the existence of a sexually

hostile working environment and took no prompt and adequate remedial action.'" 442 Mich at 395 n 41 (quoting Katz v Dole, 709 F2d 251, 255 (CA 4, 1983)) (emphasis added). See also, Chambers v Trettco, 463 Mich at 316 (employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment") (emphasis added).

Plaintiff tries to convince this Court, as she tried to convince two trial judges and three appellate judges, that Mr. Bennett's expunged record for off-premises conduct involving individuals never employed by Ford was itself "sexual harassment" and therefore "notice" that Mr. Bennett would sexually harass employees in the workplace, particularly Plaintiff. The gist of Plaintiff's argument is this: Any time an employer hears that someone alleges one of its employees has engaged in impermissible off-premises sexual conduct with non-employees, the employer is on notice that the employee will also risk his employment -- in a venue where his identity is well known -- by sexually harassing every female employee he encounters. There is absolutely no authority or logic for this leap from off-premises conduct with strangers to conduct with employees in the workplace. Indeed, the case law that has addressed this issue is sharply to the contrary. See, e.g., Tomson v Stephan, 705 F Supp 530, 536 (D Kan, 1989) (excluding evidence that defendant made sexual advances outside the employment setting because the advances were not made toward an employee: "Although the woman may have been the victim of an unwelcome sexual advance, she was not a victim of sexual harassment"). Accord, Longmire v Alabama State Univ, 151 FRD 414, 417 (MD Ala, 1992) (Defendant's "activities outside the workplace are irrelevant" to determining

existence of hostile work environment).

Similarly, Plaintiff's argument that alleged prior sexual misconduct towards others is "constructive" notice that Plaintiff herself was being harassed was rejected by the Court of Appeals in Sheridan v Forest Hills Public Schools, *supra*, 247 Mich App 611. The Sheridan plaintiff had argued that her employer was on constructive notice by virtue of two earlier workplace complaints by others, one of which was substantiated, that the same perpetrator had sexually harassed them. Sheridan, 247 Mich App at 627-628. The court held that the prior sexual harassment complaints concerning the same alleged perpetrator were not constructive notice because they provided "no basis on which to conclude that sexual harassment relating to plaintiff was occurring." Id at 628 (emphasis added).

Plaintiff has always claimed she gave actual notice, which means she does not need evidence of constructive notice. Nonetheless, Mr. Bennett's conviction, as evidence of constructive notice, is even more attenuated than the evidence offered by the Sheridan plaintiff. The "prior acts" evidence in Sheridan at least involved acknowledged workplace sexual misconduct with other employees rather than off-premises conduct with strangers. Accordingly, the trial court had ample reason to conclude that, under Chambers and Sheridan, the expunged conviction had little or no probative value on the issue of notice.[2]

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[2] Plaintiff also tried below to legitimize her argument by claiming that Mr. Bennett was driving a so-called "M-car" at the time of the off-premises conduct on I-275. M-cars are production vehicles that salaried personnel who attain a certain supervisory level may (but are not required to) drive home and on personal errands as a "perk." In exchange for this perk, the driver fills out an evaluation form. That Mr. Bennett was driving an M-car on his way home when the off-premises conduct occurred is immaterial, as there was no effect on the work environment of Plaintiff or any other Ford employee.

Plaintiff asserts Ferris v Delta Airlines, 277 F3d 128 (CA 2, 2001), is "analogous precedent." (Plaintiff's Cross-Application, p 45). Ferris is inconsistent with Sheridan to the extent it held that co-worker complaints of a sexually hostile work environment created by the same perpetrator may give rise to employer liability under federal law when that perpetrator subsequently engages in gross workplace sexual misconduct toward another employee. But Ferris does not change the fundamental requirement that an employer must be on notice of a sexually hostile work environment. In Ferris, the plaintiff, a female flight attendant for Delta, was drugged and raped by a male co-worker in a hotel room while the two were on a lay-over in a foreign country. 277 F3d at 131-132. On an earlier foreign lay-over, the same male co-worker had raped another female flight attendant in her hotel room; she promptly reported the sexual assault to Delta. Id at 132. While on yet another foreign trip, the male co-worker had made sexually suggestive remarks to another female flight attendant, and became belligerent and threatening when she turned down his dinner invitation; she also promptly reported the male co-worker to Delta. Id at 133-134. On these facts, the court considered whether off-premises conduct could ever be considered to have occurred in a "work environment." The court concluded that, in the unusual circumstances before it, it might. Even in those extraordinary circumstances, however, "the question [was a] close [one]." Id at 135.

Nothing about the events underlying Mr. Bennett's expunged conviction even remotely suggests that the off-premises events occurred in the "work environment" as that term is defined in Ferris. The three females driving on I-275 who allegedly were "victims" were not employed by Ford. They were complete strangers to Mr. Bennett and

Ford. Whatever happened did not occur in a work environment, and therefore could not constitute "a sexually hostile work environment." Radtke, 442 Mich at 395 n 41.

Finally, Plaintiff tries to confuse things by mixing apples with oranges. In Chambers v Trettco, this Court relied on common law agency principles to determine when an employer is vicariously liable for sexual harassment. From this, Plaintiff launches an argument that Ford can also be vicariously liable for sexual harassment under common law negligence principles, citing Hersh v Kentfield Builders, 385 Mich 410; 189 NW2d 286 (1971). Hersh has nothing to do with the issue in this case.

Chambers held that for an employer to be vicariously liable for a hostile work environment created by one of its employees, a plaintiff must establish "*respondeat superior,*" i.e., employer "fault," by showing that the employer had actual or constructive notice that the plaintiff was being sexually harassed but failed to take reasonable corrective action. 463 Mich at 313. This is the only basis for holding an employer liable for a hostile work environment because, in the absence of such notice, sexual harassment is "outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.'" Id at 311. In short, it is only such notice and inaction that allows the otherwise unauthorized act of an employee to be "attributed to the employer." Id at 313. As this Court explained in Chambers, this is based on the law of agency, which holds that an employer cannot be held vicariously liable for acts that are outside the scope of the agent's actual or apparent authority, unless the employer receives notice of those acts and in some way approves or ratifies them. Wickstrand v Nelson, 273 Mich 393, 398-99; 263 NW 404 (1935).

Hersh did not impose vicarious liability on an employer for the tort of an

employee under a *respondeat superior* theory. To the contrary, in Hersh, which involved an employee's criminal assault on a customer, the jury was instructed specifically that, "The act of Bennie Hutchinson, of which the plaintiff complains in this action, was clearly beyond the scope of his employment, so the mere fact of the employment does not impose liability on the defendant." 385 Mich at 414 (emphasis added). It was accordingly conceded in Hersh that the employer could not be held vicariously liable for the employee's tort on the basis of *respondeat superior*.

Hersh did not address the *respondeat superior* basis for employer liability for a hostile work environment adopted in Chambers. Rather, the Hersh plaintiff sought to hold the employer directly liable for its own independent tort for allegedly violating its general duty to "exercis[e] reasonable care for the safety of [its] customers, patrons, or other invitees." Id at 412-13. That common law duty of reasonable care is not at issue in the instant case.[3]

As Judge MacDonald observed, the question on notice here was not even a "close" question. But even if it had been, in light of the clear danger of undue prejudice, the court's ruling on that "close evidentiary question" could not "'by definition' be an abuse of discretion." Layher, 464 Mich at 761.

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[3] In Milissa McClements v Ford Motor Company et al, COA No 243764 (2004), app lv pending, SC No 126276, the Court of Appeals, relying solely on Hersh, held that Mr. Bennett's conviction and other evidence raised a question of fact with respect to Mr. Bennett's "propensity" to engage in sexual misconduct. There are many legal infirmities in this ruling, which are fully set forth in Ford's application in that case. Suffice it to say, the arguments of Plaintiff here only serve to underscore how erroneous and untenable the Court of Appeals decision in McClements is. Even Plaintiff admits that, if negligent retention is a viable claim in the context of alleged sexual misconduct and the intervening adoption of MRE 404, the burden on a plaintiff alleging negligent retention must be stronger than the burden on a plaintiff alleging sexual harassment under Elliott-Larsen. (Plaintiff's Cross-Application, p. 46).

3. The Trial Court Did Not Abuse Its Discretion In Analyzing The Conviction Under MRE 404.

The trial court excluded Mr. Bennett's 1995 misdemeanor conviction under MRE 404 because the danger of undue prejudice substantially outweighed any arguable probative value. Plaintiff cites this Court's ruling in People v Starr, 457 Mich 490; 577 NW2d 673 (1998), for the proposition that the conviction evidence is admissible to explain Plaintiff's delay in giving notice. Starr is of no assistance to Plaintiff here.

MRE 404(a) prohibits evidence of "character" to prove action in conformity therewith, and MRE 404(b) specifically prohibits the introduction of "other crimes, wrongs, or acts" in order to prove the character of a person or to show action in conformity therewith. Persichini v William Beaumont Hosp, 238 Mich App 626, 632; 607 NW2d 100 (1999). Thus, the trial court correctly held that Mr. Bennett's prior conviction could not be admitted to show that he had a predilection toward sexual misconduct and that he had acted in that way toward Plaintiff.

Plaintiff claims, however, that the trial court should admit the conviction under MRE 404(b) because it explained the timing of her "filed complaints" concerning her own allegedly hostile work environment. Plaintiff's claim is a transparent attempt to use the conviction and underlying acts as evidence of a common "plan, scheme or system," an argument two trial judges and three appellate judges rejected out of hand. At best, Plaintiff's argument is premature, raising a point that, if ever, should be addressed at the rebuttal stage of trial. VanderVliet, *supra,* 444 Mich at 89-91.

In People v Starr, *supra*, 457 Mich at 499-503, this Court held that it was not an abuse of discretion to admit testimony of other "bad acts" under MRE 404 under the peculiar circumstances in that case. Among those circumstances was the "striking

similarity" between the charged and uncharged acts (in terms of age, living arrangement, and relationship to the defendant of the two victims, as well as type of sexual abuse), and the absence of unfair prejudice to the defendant. Against this background, this Court held the trial court did not abuse its discretion in admitting the other "bad acts" where it was the only evidence that refuted allegations that the charged acts were fabricated two years after the fact. Id at 501-503.

Here, the evidence Plaintiff wishes to offer has been explicitly found to violate MRE 403 because of its undue prejudice, and has been held to be insufficiently similar in nature to have the "striking similarity" of a common plan. Moreover, Plaintiff cannot argue that it is her only evidence against a charge of "recent fabrication." Plaintiff intends to have her neighbor and former boyfriend testify that Plaintiff told him about Mr. Bennett's alleged acts within days of their supposed occurrence.

Plaintiff's claim that she needs evidence of Mr. Bennett's now-expunged conviction and underlying acts to explain why she "filed complaints" with Ford when she did is equally meritless. (Plaintiff's cross-application, p. 46). According to Plaintiff, "Ford has repeatedly argued that [Plaintiff] should not be believed because she did not file a complaint with the company until many months after [Mr.] Bennett first abused her in January 1998." (Id, p. 47). Furthermore, according to Plaintiff, she complained in October 1998 on the advice of her pastor who, in approximately June 1998, allegedly "told her that the abuse of the minors meant she had a duty as a Christian to report what [Mr.] Bennett had done." (Id).

Neither the UAW nor Ford has any record that Plaintiff complained about Mr. Bennett around June 1998 when Plaintiff's "pastor" supposedly advised her of her duty,

or even in October 1998. The earliest any UAW official can identify any conversations with Plaintiff that involved Mr. Bennett is at least one year later, in the summer of 1999. The earliest Ford has any record of Plaintiff making any type of statement is even later, in December 1999.[4]

Plaintiff's exceedingly tenuous, if not bogus, arguments in this regard emphasize how premature this Court's review of this *in limine* ruling would be. Plaintiff's argument clearly contemplates that Ford will "open the door" on this subject in the event this case ever goes to trial. If so, the trial court has authority to reconsider the admissibility of the evidence. Appellate review of such issues without the benefit of the actual evidence and the context in which it was raised at trial would be premature, speculative, and wasteful on judicial resources.

B. The Trial Court Did Not Abuse Its Discretion By Excluding The Testimony Of "Propensity" Witnesses.

Plaintiff's core claims in this case are (1) that Mr. Bennett exposed himself to her on two occasions in about January 1998 on the premises of Ford's Wixom Plant; (2)

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[4] Plaintiff's two "pastors" are actually not able to testify to any supposed conversation or even knowledge of Mr. Bennett's conviction or the underlying events, much less that they advised Plaintiff based on the conviction. David Woodby, Plaintiff's former pastor, recalled that Plaintiff gave him no specifics when he talked to her, sometime between June and November 1998, saying only "she was being sexually harassed by her supervisor and that he was coming on to her very aggressively." (Exhibit 3, pp. 14, 18, 24, 26). It was not until November 1998 that Plaintiff told Mr. Woodby about Mr. Bennett allegedly exposing himself to her, and even then Plaintiff talked only about a single event, the supposed June 1998 encounter. (Id, pp. 20, 25).

Plaintiff's other "pastor," Stuart Odom, was not told about any alleged exposure by Mr. Bennett. (Exhibit 4, p. 50). He recalled that Plaintiff described a single incident where a supervisor followed her into a parking lot and purportedly offered her a promotion in exchange for sex, which she declined. (Id, pp. 29-30). Nor was Mr. Odom really a "pastor" for Plaintiff -- he was just one of many men Plaintiff "met" through a late-night internet chat room. (Id, p. 12).

that in June 1998 Mr. Bennett followed her to a floral shop parking lot where he tried to put his hand down her blouse; and (3) that in approximately March 1999 through June 1999, Mr. Bennett made inappropriate sexual gestures (R. 307, Exh. E). According to Plaintiff, this conduct created a sexually hostile work environment for her.

Plaintiff seeks to prove her claim by presenting the testimony of others that Mr. Bennett had allegedly exposed himself to two other female Ford employees, and had tried to kiss certain other women, and had asked still others out or had simply sent a "signal" that he would like to go out with them. Plaintiff witnessed none of this alleged sexual conduct involving others, and learned of almost all of these accusations during, and as a result of, her own litigation.[5]

None of this proffered "me too" testimony by others is about Plaintiff's claim. At most, it would support only claims by those others. In Plaintiff's case, all of this testimony by and about others has the single purpose of establishing a "propensity" of Mr. Bennett to sexually harass women, to show he must have sexually harassed Plaintiff as well. Such "propensity" evidence runs directly into the wall of MRE 404(a) -- for the same reasons that Mr. Bennett's expunged conviction does.

The trial court held that this "propensity" testimony failed the balancing test of MRE 403 -- just as the conviction and its underlying facts did. To present such sensational testimony in Plaintiff's case could only confuse the jury regarding whose claim is being tried. This parade of "propensity" witnesses with their own individual and completely unproven stories, and the aura of illegality raised by sheer repetition of scandalous accusations, could have no purpose or effect other than to prejudice

[5] Plaintiff in fact tried to recruit co-workers to make up stories about Mr. Bennett and become part of her $50 million "class action."

Defendants. To respond to such "propensity" testimony, Ford would have to conduct mini-trials into each of these claims, or forego its due process right to adequately defend itself. It was on this basis that Defendants requested -- and the trial court granted -- an order *in limine* excluding this "me too" or "propensity" testimony.

The Court of Appeals, however, ruled that this propensity evidence was admissible on the issue of "notice" to Ford of Plaintiff's alleged hostile environment. Ford maintains that this ruling is wrong as a matter of law, for the reasons set forth in Ford's application. The additional purposes for which Plaintiff now argues that this propensity evidence should be admitted are even more spurious.

1. Plaintiff's Claimed Purposes Do Not Fit The MRE 404 Exceptions.

Plaintiff argues that this evidence is offered for a permissible purpose under MRE 404(b), specifically as evidence of a "common scheme, plan or system." As with the expunged conviction, though, this "propensity" evidence evinces nothing more than "a [mere] similarity in the results," with no more than "'the same doer, and the same sort of act,'" that is clearly insufficient to support a common scheme, plan or system. People v Sabin, 463 Mich 43, 64; 614 NW2d 888 (2001). The only common feature among the "propensity" witnesses is that each witness makes an allegation involving "the same doer."

For evidence of "other crimes, wrongs, or acts" to be admitted for some purpose permitted under MRE 404(b), the prior act must have some probative value other than its tendency to show a propensity to commit such acts. People v Engleman, 434 Mich 204; 453 NW2d 656 (1990). As this Court explained in Engleman, there are only three ultimate issues for which prior acts evidence may, in the trial court's discretion, be

admitted: (1) identity; (2) mental state; and (3) actus reus, i.e., as proof that the charged act was committed. 434 Mich at 215. Where, as here, the ultimate issue on which the evidence was proffered was as proof that the charged act was committed, courts should be "understandably more reluctant" to allow the evidence. Id at 215-216. Neither Mr. Bennett's nor Ford's identity or mental state is an element of Plaintiff's hostile environment claim, leaving actus reus as the only basis for admission.

Because of the thread-like fine line that separates impermissible character evidence from permissible other acts evidence to prove the misconduct was committed, the only other acts evidence that is admissible is that which establishes an intermediate inference that, in turn, proves that the defendant indeed engaged in the charged conduct. One such intermediate inference is evidence that a defendant devised a common plan or scheme of which the charged misconduct is but one manifestation among many. Engelman, 434 Mich at 217-219. As just noted, evidence sufficient to establish a common plan or scheme requires "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" Sabin, 463 Mich at 64 (quoting Wigmore, Evidence, § 304 (Chadbourn rev, pp 250-251)). More specifically, to prove a common plan or scheme, there must be more in common than "the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer," i.e., more than the lesser standard that may be sufficient where the issue is intent rather than common scheme or plan. Id. In short, "the combination of features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and

distinct test." Id.

There is no "concurrence of common features" here. Even the types of alleged acts run the spectrum from invitations to meet at a Taco Bell to attempted kisses to exposure. Even if one were to limit the inquiry to Ms. Elezovic and Ms. Perez (the two witnesses who, along with Plaintiff, claim Mr. Bennett exposed himself), there still is no "concurrence of common features." Plaintiff claims Mr. Bennett lured her behind a building. If that was a scheme or plan, it is not one he followed with Ms. Elezovic or Ms. Perez. For example, while Plaintiff's wrongly misrepresents that Mr. Bennett "summoned" Ms. Perez to his office so he could carry out his "scheme or plan," Ms. Perez in fact voluntarily headed to Mr. Bennett's office with two of her co-workers. (R. 330, Exh. A, attached as Exhibit 5). What Ms. Perez alleges is no more than the sort of '"similar spontaneous act" that does not support a finding of a common scheme or plan. Sabin, 463 Mich at 66, quoting, People v Ewoldt, 7 Cal 4th 380, 403; 867 P2d 757 (1994).

Nor is there similarity of the "victims." The sufficiently common features in Sabin were that the victims were daughters of the defendant, both sexually abused at the same young age, both members of the defendant's household when the abuse occurred, and both threatened that reporting the abuse would break up the family home. 463 Mich at 66. Under these circumstances, the Court concluded that "[o]ne could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetuate abuse." Id.[6]

[6] This Court has given similar latitude to prosecutors in other sexual abuse cases

The striking similarities of family relationships, living arrangements and tender years that were critical to the common scheme or plan in Sabin are completely absent here. While Plaintiff asserts that all of the "propensity" witnesses were "vulnerable" adult women, such a gross generalization cannot conceivably satisfy the test. The "close evidentiary question" in Sabin is not even colorable here.[7]

Plaintiff additionally argues that the propensity testimony should be admissible on the issue of Ford's "intent" to discriminate, citing to Riordan v Kempiners, 831 F2d 690 (CA 7, 1987); Robinson v Runyan, 149 F3d 507 (CA 6, 1998), and other disparate treatment cases. These cases are clearly inapplicable here because the employer's intent is an element of a disparate treatment claim. This Court made clear in Radtke v Everett, *supra*, 442 Mich 368, that employer intent is not an element of hostile environment claim, where the employer's liability is based on *respondeat superior*. Id at 382-383.

Lastly, Plaintiff argues that the propensity testimony should be admissible to

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involving minor children residing in the defendant's household. For example, in Starr, *supra*, the defendant was charged with engaging in criminal sexual acts with his six-year-old adopted daughter, who was then living with him. 457 Mich at 492. The trial court admitted testimony that the defendant had sexually abused his younger half-sister from the time she was four years old. Id at 493. The Court agreed this testimony was admissible to prove the actus reus, again based on similarity in family relationship and tender age: "the half-sister's testimony revealed a striking similarity between the half-sister's age, living arrangement, and relationship with the defendant at the time the abuse began, to that of the victim." Id at 503. As the Court explained in Sabin, MRE 404(b) determinations take into account all of the unique circumstances in the particular case. Among those unique circumstances this Court repeatedly has found determinative is sexual abuse of minor family members residing in the defendant's household.

[7] Ms. Elezovic's accusation already has been tried and found baseless. Therefore, it should be excluded on the further ground that the "evidentiary safeguard" requirement, (i.e., that there is "substantial proof that the defendant committed the other act sought to be introduced," Engelman, *supra*, 434 Mich at 213) cannot be satisfied.

prove that Ford's policy against sexual harassment is ineffective. Plaintiff's argument necessarily pre-supposes these propensity witnesses used Ford's policy and it did not work -- a fallacy. Not one of these propensity witnesses used Ford's policy to report Mr. Bennett; rather, Ford learned of their claims through litigation brought long after the fact, and after Mr. Bennett's alleged conduct toward Plaintiff admittedly ceased in June 1999. Indeed, on the one occasion when Ms. Perez and Ms. McClements reported alleged sexual misconduct by anyone, the issues were promptly addressed and resolved.

2. Admitting The "Propensity" Testimony Would Prejudice Ford And Confuse The Jury.

Even if Plaintiff's proffered "propensity" testimony could overcome MRE 404 constraints, its value is substantially outweighed by the danger of unfair prejudice to Ford. See MRE 403; Franzel v Kerr Mfg Co, 234 Mich App 600, 618; 600 NW2d 66 (1999) ("even relevant evidence may be excluded . . . where a tendency exists that the evidence will be given undue or preemptive weight by the jury").

Evidence concerning sexual advances directed at others is titillating, sensational, and, if proven, illegal. Even false innuendos arouse exceptional attention and reaction. The suggestion that Mr. Bennett engaged in illegal sexual acts against others could only serve to inflame the jury and cause the jury to want to "punish" Ford for such perceived illegality. In Bhaya v Westinghouse Elec Corp, 922 F2d 184 (CA 3, 1990), cert den, 501 US 1217 (1991), the Third Circuit held that the trial court had wrongly admitted evidence that suggested the plaintiff's management engaged in illegal conduct not directly tied to the action the plaintiff challenged as discriminatory. As the court explained, "the jury probably was left with the impression that [Westinghouse's] managers were a lawless bunch." Id at 187-188. Courts exclude the very type of "me too" evidence integral to

Plaintiff's trial strategy here. See, eg, McCue v State of Kansas Dept of Human Resources, 165 F3d 784, 790 (CA 10, 1999) (error to admit character evidence that the plaintiff's supervisor may have discriminated against other employees); Coleman v Quaker Oats Co, 232 F3d 1271, 1296 (CA 9, 2000) (parade of witnesses, each testifying to their own personal age claims, would unduly prejudice employer), cert den, 533 US 950 (2001); Schrand v Federal Pacific Elec Co, 851 F2d 152, 156-57 (CA 6, 1988) (reversible error to admit "me too" evidence). The probative value of the "me too" evidence also must be factored into the MRE 403 analysis. It is firmly established that conduct that was not directed at Plaintiff, even if Plaintiff actually witnessed it (which she did not in this case), is of little probative value. Black v Zaring Homes Inc, 104 F3d 822 (CA 6, 1997).

Plaintiff hopes the jury will be incensed simply by hearing the allegations by these other women, and on that basis find in Plaintiff's favor. The sheer number of allegations, regardless of their truth, is likely to incite a jury and lead the jurors to conclude that Mr. Bennett must have done something wrong to someone. Because such speculative piggybacking could only encourage the jury to render an improper verdict, the trial court did not abuse its discretion in ordering the testimony excluded *in limine*.

In addition to precluding evidence that is unduly prejudicial, MRE 403 precludes the introduction of evidence that is likely to confuse the jury. The "propensity" testimony Plaintiff wants to offer would confuse the jury about whose claim is being tried, because the inevitable outcome would be serial mini-trials for each claim of each "propensity" witness. See eg, Annis v County of Westchester, 136 F3d 239 (CA 2, 1998); Sims v

Mulcahy, 902 F2d 524 (CA 9, 1990). The complexity of that scenario, and the potential for prejudice and confusion, are discussed in detail in Ford's application (pp. 44-45). Clearly, the trial court did not abuse its discretion because the testimony, even if arguably admissible under MRE 404(b), would properly be excluded under MRE 403.

IV. RELIEF REQUESTED

Defendant Ford Motor Company respectfully requests that the Court deny Plaintiffs' cross-application.

Respectfully submitted,

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Dated: July 27, 2004